Supreme Court, U. S.
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No. 80-165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MAISLIN TRANSPORT OF DELAWARE
and MAISLIN TRANSPORT LIMITED,

Petitioners,

—against—

FARRELL LINES INCORPORATED, as successor
by merger to AMERICAN EXPORT LINES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can an inland motor common carrier limit its liability to $500 for a refrigerated container load of frozen Dover sole worth about $100,000, despite its failure to comply with the requirement of the Carmack Amendment, 49 U.S.C. § 20(11), that the limited valuation be agreed in writing on the bill of lading?

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Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully requests that this Court deny the petition for a writ of certiorari to review that part of the decision of the United States Court of Appeals for the Second Circuit, dated February 22, 1980, which denied petitioners' partial defense of limitation of liability. The Court of Appeals decision reversed the judgment of the United States District Court for the Southern District of New York, dated June 12, 1979, which had found respondent solely liable for damages. Thus, the district court did not reach the issue of petitioners' liability limitation defense.

STATEMENT OF THE CASE

Maislin asks this Court to change the plain meaning of the Carmack Amendment, 49 U.S.C. § 20(11). The Carmack Amendment required an agreement in writing to limit the value of the cargo in suit and thus to limit Maislin's liability. No such writing existed, and the Second Circuit properly denied Maislin's argument that its liability for the $100,000 cargo should be limited to $500.

If this Court were to change the well defined law in this area, it would open Pandora's Box to the kind and volume of liability limitation litigation now experienced in admiralty in admiralty's effort to define the intent of the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5).

The cargo in suit was carried by American Export Lines, later merged with respondent Farrell Lines Incorporated, from Amsterdam to New York, and was carried by petitioner Maislin from New York to Toronto, Canada.

The cargo of fish was in good condition at about minus 10° Fahrenheit when American Export delivered it to Maislin at the Port of New York.

Maislin later mistakenly raised the refrigerated container's setting from minus 10° Fahrenheit to plus 40° Fahrenheit. This change of temperature rotted the fish.

The United States Court of Appeals held both American Export and Maislin jointly and severally liable, and apportioned the liability equally. American Export was held liable because the Court decided that it gave Maislin inadequate instructions. Maislin was held liable because it negligently raised the temperature setting and rotted the fish.

Maislin does not contest the Second Circuit's conclusion that it was fifty percent negligent. It only contests that part of the Second Circuit's opinion which denied Maislin's argument that its liability was limited to $500.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

The Court of Appeals for the Second Circuit properly held that petitioner could not limit its liability in the instant case because of its failure to comply with the explicit statutory requirements of the Carmack Amendment, 49 U.S.C. § 20(11), which determined the conditions under which an inland motor carrier could avail itself of limited liability. The statute, reproduced in full in the appendix to this petition, is clear that petitioner may limit its liability only if the cargo's full

> ". . . value [is] declared *in writing* by the shipper or agreed upon *in writing* as the released value of the property . . ." (Emphasis supplied.)

Petitioner acknowledged that its inland bill of lading failed to contain an agreed upon *written* statement of the released value of the shipment (Petition, p. 4). Moreover, the bill of lading did not contain a statement of the freight rate nor an agreement to limit the petitioner's liability to $500. Accordingly, the Court of Appeals, citing a series of decisions which had rejected carriers limitation defenses founded upon this and similar released value clauses, properly held that petitioner could not limit its liability. *Mass.* v. *Braswell Motor Freight Lines*, 577 F.2d 665 (9th Cir. 1978); *Thomas Electronics, Inc.* v. *H.W. Taynton Co.*, 277 F. Supp. 639 (M.D. Pa. 1967); *Loeb* v. *Friedman's Express, Inc.*, 187 Misc. 89, 65 N.Y.S.2d 450 (Sup. Ct. App. Term), aff'd mem., 271 A.D. 873, 66 N.Y.S.2d 634 (1946), aff'd per curiam, 296 N.Y. 1029, 73 N.E.2d 906, cert. denied, 331 U.S. 851 (1947).

Petitioner asserts that a writ of certiorari should be granted because the Court of Appeals decision herein is in conflict with that of the Court of Appeals for the Ninth Circuit in *Boeing Co.* v. *U.S.A.C. Transport, Inc.*, 539 F.2d 1228 (9th Cir. 1976) and the decision of this Court in *American Railway*

Express Co. v. *Lindenberg*, 260 U.S. 585, 43 Sup. Ct. 206 (1922). Respondent submits that a review of the cited decisions readily reveals that such conflicts do not exist. Unlike the instant case, in both *Boeing* and *Lindenberg* there existed on the carrier's bills of lading a *written* statement of released valuation of the cargo and a *written* agreement as to the carrier's limitation of liability. The presence of these written declarations constituted compliance with the Carmack Amendment's "in writing" requirement and, therefore, allowed the carrier to limit its liability. The decisions which petitioner relies on are clearly distinguishable from, and not in conflict with, the Court of Appeals' decision herein. Rather, the Court of Appeals has decided this issue on the basis of long standing precedent founded on the plain meaning of the controlling statute.

Moreover, petitioner, in seeking a reversal of the Court of Appeals decision, is requesting this Court to place the law governing the limitation of an inland motor carrier's liability into an uncertain, perplexing and litigious state. Since its passage in 1916, the Carmack Amendment (previously entitled the Cummins Amendment and now 49 U.S.C. 10730) has provided inland carriers with specific guidelines wherein they might limit their liability for damages to less than the cargo's full value. By expressly requiring that a *written* agreement of the limited value be made a condition precedent to limitation, the Act has simplified inland motor carrier practices, and has avoided needless litigation.

Unlike the explicit requirements of the Carmack Amendment, the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. 1300, et seq., which governs the limitation of an ocean carrier's liability, does not require that there be a *written* agreement as to the shipment's value as a condition precedent to limitation. COGSA's failure to define specifically the requirements for limitation has resulted in a plethora of litigation. See, M.E. DeOrchis, *The Container & The Package Limitation—The Search For Predictability*, 5 J. Maritime Law

& Commerce 251 (1974). The ocean carrier law remains in a confused state, and the shipping industry continues to be uncertain as to when an ocean carrier's liability may be limited. It is respectfully submitted that granting this petition would lead the law governing an inland carrier's liability into the same quagmire that has engulfed the limitation law of ocean carriers.

POINT I

THE COURT OF APPEALS PROPERLY DENIED PETITIONER'S CLAIM FOR LIMITATION OF LIABILITY.

In accordance with the long standing precedent and the plain meaning of the Carmack Amendment, the Court of Appeals held that petitioner could not limit its liability because neither the freight rate nor the valuation of the shipment was *written* on the inland bill of lading. Without exception, the Courts have consistently determined that without such a writing, an inland motor carrier may not limit its liability.

The inland bill of lading issued by petitioner is a form inland bill of lading approved by the Interstate Commerce Commission and used generally by all motor carriers engaged in the overland transportation of cargo. *In the Matter of Bills of Lading*, 52 I.C.C. 671 (1919). Accordingly, petitioner's inland bill of lading contained the standard released value stipulation:

> "Where the rate is dependent on value, shippers are required to state specifically *in writing* the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____." (Emphasis supplied.)

The blank spaces in the above stipulation, wherein the agreed or declared (limited) value of the cargo could have been stated, were never filled in.

Despite petitoner's assertions, there is absolutely nothing novel about the Court of Appeal's determination of the limitation issue here. The exact same released valuation clause was discussed by the Court of Appeals for the Ninth Circuit in *Mass* v. *Braswell Motor Freight Lines, Inc.*, 577 F.2d 665 (9th Cir. 1978). This case was decided by the Ninth Circuit two years after it decided *Boeing Co.* v. *U.S.A.C. Transport, Inc.*, 539 F.2d 1228 (9th Cir. 1976) relied upon by petitioner. There, as with petitioner's inland bill of lading herein, the blank spaces in the released valuation clause were not filled in by the shipper or motor carrier. Accordingly, the Court of Appeals affirmed the District Court's holding that the motor carrier could not limit its liability because the shipper had not declared a value for the shipment or agreed to one in writing. Moreover, the inland bill of lading failed to contain either a freight rate or a released value. The Court of Appeals properly ruled, at 667, as follows:

> The Carmack Amendment provides that a common carrier cannot limit its liability to a shipper without a value "declared in writing by the shipper or agreed upon in writing as the released value of the property."
>
> Mass did not declare a value or agree to one in writing. The bill of lading did not contain a value or freight rate.
>
> The Court correctly ruled that Braswell could not enforce the limitation on liability provision in Section 5 of the bill of lading.

Similarly, in *Thomas Electronics, Incorporated* v. *H. W. Taynton Company*, 277 F. Supp. 639 (M.D.Pa. 1967), an inland motor carrier was prevented from limiting its liability where an agreed or declared value of the shipment was not filled in by either the shipper or carrier on a released valuation clause similar to the one involved herein. The District Court, in finding plaintiff to be entitled to a full recovery properly held, at 642:

> Unless the carrier either rejects the shipment or fully complies with the requirements of Secton 20(11) of the Interstate Commerce Act, it remains fully liable for all the goods it carries, regardless of their value.
>
> Shippers have no legal duty to state the value of their goods on the Bill of Lading and their failure to do so will not destroy the protection afforded them by Section 20(11) of the Interstate Commerce Act.

Moreover, the Court of Appeals for the Second Circuit in denying petitioner's claim of limited liability, followed the directives issued by that Court nearly 35 years ago in *Caten* v. *Salt City Movers & Storage Co.*, 149 F.2d 428 (2d Cir. 1945). There, the Court found that an inland motor carrier could not avail itself of limited liability because of its failure to comply with the Carmack Amendment's requirement that there exist a *written* declaration or agreement as to the value of the shipment being carried. The *Caten* decision explained, at 432:

> So as the law now stands the only limitation of liability permitted is conditioned upon a compliance with the proviso of [49 U.S.C. § 20(11)]. Any attempt to limit liability is prohibited except upon a declaration of value by the shipper in writing or upon a released value agreed to in writing.

It is undisputed that in the instant matter a *written* declaration or agreement as to the shipment's value was never made. Accordingly, the Court of Appeals held that petitioner could not limit its liability under the controlling statute.

POINT II

THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT OR OF ANY CIRCUIT.

Petitioner contends that in exercising its discretion to grant this writ the Court consider that the Court of Appeals decision

herein is in conflict with this Court's decision in *American Railway Express Company* v. *Lindenberg*, 260 U.S. 584 (1922) and the Court of Appeals for the Ninth Circuit's decision in *Boeing Company* v. *U.S.A.C. Transport, Inc.*, 539 F.2d 1228 (9th Cir. 1976). However, respondent respectfully submits that the cases relied upon by petitioner support, rather then conflict with, the Court of Appeals decision herein.

In *Lindenberg*, this Court allowed a motor carrier to avail itself of limited liability because of the existence of a written agreement between the shipper and the carrier as to the released value of the cargo. The express receipt issued by the carrier contained language substantially in accord with the following released valuation agreement:

> In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding *$50 for any shipment of 100 pounds or less, and not exceeding $.50 per pound, actual weight, for any shipment in excess of 100 pounds*, the shipper agrees, unless a greater value be declared at the time of shipment, that the company shall not be liable in any event for more than these amounts. (Emphasis supplied).

Id. at 587. This Court held that the clause constituted a specific *written* valuation of the shipment in conformity with the Cummins Amendment then in effect. The fact that the express receipt was not signed by the shipper did not prevent the carrier from limiting its liability in that the shipper's acceptance of the receipt containing the written valuation was sufficient to bind it to the receipt's written terms.

Similarly, the Ninth Circuit Court of Appeals in *Boeing* made clear that it granted the motor carrier's limitation of liability because the carrier's bill of lading contained an agreed upon *written* statement of the released value of the cargo. The Court of Appeals specifically rejected Boeing's contention that the carrier's bill of lading contained no statement of released value "agreed upon in writing" as required by the Carmack

Amendment. That bill of lading contained a written valuation of $2.50 per pound, and the Court found that it constituted a written declaration and agreement as to the shipment's released value. The Ninth Circuit followed *Lindenberg* in regard to its finding that it did not require the shipper's signature as evidence of its agreement in that the bill of lading contained a specific written valuation of the shipment.

Both *Lindenberg* and *Boeing* allowed limitation where a *written* valuation of the cargo and a specific limitation agreement were contained on the inland bill of lading. In the instant matter, it is undisputed that such a written declaration or agreement did not exist. Pursuant to the explicit "in writing" requirement of the Carmack Amendment, the Court of Appeals for the Second Circuit properly denied petitioner's claim for limitation of liability.

POINT III

THE PUBLIC POLICY GOALS OF CLARIFICATION AND SIMPLIFICATION OF THE LAW AND THE AVOIDANCE OF UNNECESSARY LITIGATION ARE SERVED BY THE COURT OF APPEALS DECISION.

If petitioner were to prevail on its interpretation of the law governing the limitation of an inland motor carrier's liability, a Pandora's Box for litigation by trucking companies seeking to avoid the constraints of the Carmack Amendment would be opened. The specific guidelines of the Act have been in force for nearly 65 years and have served the trucking industry well by enabling it to establish conforming practices and procedures. By making clear the conditions under which a carrier may limit its liability, the Act has allowed the industry effectively to allocate the risk of loss in overland transportation and thereby establish an efficient price structure. Although the language of the controlling statute has been amended several times, Congress has made no substantive change in the requirement that a *written* declaration or agreement as to value remain a condition precedent to an

inland carrier's limitation. 49 U.S.C. § 10730, P.L. 95-473, October 17, 1978.

COGSA, which governs the limitation of an ocean carrier's liability, does not mandate that there be an in writing agreement as to the shipment's value. 46 U.S.C. § 1304(5). As a result, the Courts have been deluged, since the passage of the Act in 1936, with litigation attempting to define the situations in which an ocean carrier may avail itself of limited liability. Petitioner, in seeking to remove the "in writing" requirement of the Carmack Amendment, is attempting to place the law governing inland motor carrier limitation into a similarly confused state.

In acknowledgement of the virtues of having a clearly defined test to determine the extent of carrier liability, Courts in the Second, Fifth and Ninth Circuits have read into the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300, *et seq.*, a simple requirement for limiting a carrier's liability not unlike the Carmack requirement. *General Electric Company* v. *M.V. Lady Sophie*, 458 F. Supp. 620 (SDNY 1978), held that even a shipper as sophisticated as General Electric could not be faced with a limitation of the value of its claim if it did not receive written notice of the limitation and of its opportunity to avoid the limitation.

This same basic Carmack requirement has also been read into the Carriage of Goods by Sea Act by the Ninth Circuit in *Pan American World Airways Inc.* v. *California Stevedore and Ballast Company*, 559 F.2d 1173 (9th Cir. 1977) and in the Fifth Circuit by the District Court of Georgia in *Sentinel Enterprises, Inc.* v. *SS Traviata, et al.*, Civ. 477-263, (D.Ga., Savannah Div., Nov. 26, 1979) *appeal docketed*, No. 80-7029 (5th Cir. 1980). But see, *Brown & Root, Inc.* v. *M/V Peisander, et al.*, 75-H-2193 (S.D.Texas, Houston Div., Oct. 3, 1977) *appeal docketed*, No. 77-3277 (5th Cir. 1977).

This trend of the law should not be changed. The Second Circuit decision now before the bar should remain unchanged.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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APPENDIX

Text of Carmack Amendment, 49 U.S.C., Section 20(11), Applicable During the Times in Question

§ 20, par. (11). *Liability of initial and delivering carrier for loss; limitation of liability; notice and finding of claim.* Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State of Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a

through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided. however*, That *the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply*, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, *to property*, except ordinary livestock, *received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released*, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "or-

dinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulations, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further*, That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided. Feb. 4, 1887, c. 104, Pt. I, § 20, 24 Stat. 386; June 29, 1906, c. 3591, § 7, 34 Stat. 593; Mar. 4, 1915, c. 176, § 1, 38 Stat. 1196; Aug. 9, 1916, c. 301, 39 Stat. 441; Feb. 28, 1920, c. 91, §§ 436-438, 41 Stat. 494; July 3, 1926, c. 761, 44 Stat. 835; Mar. 4, 1927, c. 510, § 3, 44 Stat. 1448; Apr. 23, 1930, c. 208, 46 Stat. 251; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 13(b), 54 Stat. 919. (Emphasis supplied.)